CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1945

CERTIORARI GRANTED OCTOBER 8, 1945

SUPREME COURT OF THE UNITED STATES

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A [Caption omitted.]

2 In the Tax Court of the United States

Docket No. 2943

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: J. E. Price, Esq. For Comm'r: Frank B. Schlosser, Esq.

Docket Entries

1943

Sept. 17—Petition received and filed. Taxpayer notified. Fee Paid.
Sept. 18—Copy of petition served on General Counsel.
Oct. 12—Agreed motion to place on Galveston, Texas, Calendar, Oct. 25, 1943, filed.
Oct. 13—Answer filed by General Counsel.
Oct. 13—Request for hearing in Houston, Texas, filed by General Counsel.
Oct. 14—Motion of October 12, 1943 granted.
Oct. 14—Copy of answer and request served on taxpayer. (Galveston, Texas)
Oct. 14—Hearing set October 25, 1943—Galveston, Texas.
Oct. 25—Hearing had before Judge Black on merits. Submitted. Stipulation of facts and exhibits attached thereto. Petitioner's brief due 1/2/44. Respondent's reply brief 2/2/44. Petitioner's reply brief due 2/17/44.
Nov. 30—Transcript of hearing 10/25/43 filed.
3 Dec. 30—Motion for extension to 2/1/44 to file petitioner's brief, 3/3/44 to file respondent's brief and 3/18/44 to file petitioner's reply brief, filed by taxpayer. Granted.

1944

Jan. 29—Brief filed by taxpayer. (1) Copies rec'd 1/31/44.
Feb. 19—Reply brief filed by General Counsel. Served 2/21/44.
Mar. 14—Reply brief filed by taxpayer.
Apr. 5—Opinion rendered. Judge Black. Div. 15. Decision will be entered under Rule 50. 4/5/44. Copy served.
May 1—Computation of deficiency filed by General Counsel.
May 3—Hearing set May 31, 1944 on settlement.

May 11—Consent to settlement filed by taxpayer.
May 13—Decision entered. Judge Black. Div. 15.
Aug. 2—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by General Counsel.
Aug. 14—Proof of service filed by General Counsel on attorney.
Aug. 14—Proof of service filed by General Counsel on Executrix.
Oct. 2—Certified copy of order from 5th Circuit extending the time to 11/30/44 to prepare and transmit the record filed.
Nov. 13—Praecipe for record filed by General Counsel with proof of service thereon.

[File Endorsement Omitted.]

4 In the Tax Court of the United States

Docket No. 2943

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition

Filed Sept. 17, 1943

I

The Petitioner is a citizen of the City of Houston, State of Texas, now residing at 2315 Dryden Road, but formerly residing at 1415 East Alabama Street, in said City and State. Harry Holmes died testate in Houston, Texas, on October 5, 1940, leaving his wife, Lucy B. Holmes, sole devisee and Independent Executrix of his Estate, and she is now the duly qualified and acting Independent Executrix of said Estate. The Estate Tax Returns for the Estate of Harry Holmes, deceased, were duly and timely filed with the Collector for the First District of Texas, located at Austin, Texas.

II

The notice of deficiency was mailed to Petitioner on July 3rd, 1943; a copy of which notice is attached hereto marked "Exhibit A."

5

III

The taxes in controversy are Estate Taxes on the one-half community interest on the Estate of Harry Holmes in the amount of Thirteen Thousand, Four Hundred Ninety-one and 38/100 ($13,491.38) Dollars, from which will be deducted as Taxes State Inheritance Taxes the sum of $685.96, as corrected and paid on July 30, 1942, as per photostatic copy of Receipt attached hereto marked "Exhibit B."

IV

(a) The Commissioner erred in his determination of the additional tax set forth in the notice of deficiency in holding "pursuant to the provisions of Section 811 (d) of the Internal Revenue Code" "the transfers made by the decedent to a trust executed under date of January 20, 1935, for the benefit of his three sons and certain other contingent beneficiaries, are properly includible in the gross estate of the decedent, that is to the extent of the decedent's community property interest therein."

(b) The Commissioner erred in holding that the Decedent's community property interest in said trusts were includible in Decedent's gross estate.

V

Decedent, Harry Holmes, died testate on October 5, 1940, and left surviving him his wife, Lucy B. Holmes, as sole devisee and Independent Executrix of his estate, and she is now the duly qualified and acting Independent Executrix of said estate; also, three sons: Harry Holmes, Jr., twenty-seven (27) years of age, a single man; John B. Holmes, twenty-four (24) years of age, a married man; and Thomas J. Holmes, nineteen (19) years of age, a single man whose disabilities were removed on the 31st day of December 1940. The said Harry Holmes, on the 20th day of January 1935, made, executed and delivered an instrument which he signed "Harry Holmes, Grantor and Trustee" in which he created three (3) trusts in favor of his three above men-

6 tioned sons. In this trusts instrument he conveyed to Harry Holmes, Trustee, and to Successor Trustee provided for, ten (10) shares of stock in the Quintana Petroleum Company, a corporation, for each of said three sons. This corporation was thereafter liquidated and the prorata part of the corporation's assets conveyed to Harry Holmes, Trustee, under and by virtue of the above mentioned trusts instrument. The basis of the additional tax is that the transfers made by the Decedent in the Trusts Instrument of date January 20, 1935, for the benefit of his three sons, and other contingent beneficiaries in the event

of their death, are includible in the gross estate of the Decedent to the extent of the value of his one-half (½) community property interest in the trust property at the date of Decedent's death.

Wherefore, petitioner prays that this Honorable Court hear this proceeding and set aside the asserted deficiency for Estate Taxes for the year 1940 on the Estate of Petitioner herein; and Petitioner prays for all other and further relief to which Petitioner may be entitled.

ESTATE OF HARRY HOLMES,
DECEASED,
By LUCY B. HOLMES,
LUCY B. HOLMES,
Independent Executrix.

Mailing address—13th Floor Sterling Building.

J. E. PRICE,
J. E. PRICE,
Counsel for Petitioner.

Mailing address—13th Floor Sterling Building, Houston, Texas.

7 *Exhibit B to petition.*

Received No. 2 July 31, 1942.
The Comptroller of Public Accounts.

This duplicate and stub must be forwarded to Comptroller.

DUPLICATE

No. 7—$685.96

Inheritance Tax Receipt—State of Texas, Harris County, Texas

Received from Mrs. Lucy B. Holmes Six Hundred eighty-five and 96/100 Dollars, in payment of Inheritance Tax on the sum of Seventy-one Thousand Seven Hundred Ninety-seven and 89/100 Dollars, inherited by Lucy B. Holmes from the Estate of Harry Holmes, Deceased, July 30th, 1942.

[SEAL]

JIM H. GLASS,
Tax Collector.
R. DUERER,
Dpty.

Countersigned
TED H. SHEPPERD,
Comptroller of Public Accounts.

8 *Exhibit A to petition*

Form 1236—SN–ET–1

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Dallas 1, Texas, July 3, 1943.

Office of Internal Revenue Agent, In Charge Dallas Division.
MT–ET–Dist. of First Texas, Estate of Harry Holmes. Date of death: October 5, 1940.

ESTATE OF HARRY HOLMES, Deceased,
Lucy B. Holmes, Independent Executrix,
1415 East Alabama Street, Houston, Texas.

MADAM: You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $13,491.38, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Dallas 1, Texas for the attention of MT–ET–HGB. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the de-
9 ficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner,
By (Signed) E. A. PEAVY,
Acting Internal Revenue Agent in Charge.

HGB: td.
Enclosures:
Statement.
Form or waiver.

10 MT–ET.

District of First Texas.
Estate of Harry Holmes.
Date of Death: October 5, 1940.

STATEMENT

Estate tax—Liability, $15,001.12; assessed, $1,509.74; deficiency, $13,491.38.

In making the determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination dated October 21, 1942, to the protest dated December 9, 1942, and to statements made at the conference held on January 8, 1943.

ADJUSTMENTS TO NET ESTATE

Net estate for basic tax as disclosed by return		($58,497.24)
Additions to value of net estate and decrease in deductions:		
Real Estate	$28,740.63	
Stocks and Bonds	135.00	
Other miscellaneous property	250.00	
Transfers	91,593.17	
Funeral Expenses	987.50	
Executor's Commissions	500.00	
Miscellaneous Administration Expenses	40.26	122,246.56
Net estate for basic tax as adjusted		63,749.32
Net estate for additional tax as disclosed by return		1,502.76
Additions to value of net estate and decrease in deductions:		
Real Estate	$28,740.63	
Stocks and Bonds	135.00	
Other Miscellaneous Property	250.00	
Transfers	91,593.17	
Funeral Expenses	987.50	
Executor's Commission	500.00	
Miscellaneous Administration Expenses	40.26	
		122,246.56
Net estate for additional tax as adjusted		123,749.32

EXPLANATION OF ADJUSTMENTS

Schedule A—Real Estate

Item	Returned	Determined
1	$2,125.00	$3,500.00
2	1,260.00	2,116.00
4	10.00	200.00
9	150.00	300.00
10	45.00	90.00
11	225.00	449.00
13	225.00	600.00
14	25.00	125.00
15	375.00	500.00
16	362.50	750.00
17	50.00	362.50
18	5.00	10.00
20	350.00	370.00
21	15.62	25.00
22	100.00	200.00
23	5.00	17.50
24	250.00	625.00
25	200.00	300.00

EXPLANATION OF ADJUSTMENTS—Continued

Schedule A—Real Estate—Continued

	Returned	Determined
Item:		
26	$30.00	$60.00
27	1,662.50	2,375.00
29-31	37.50	90.00
32	280.00	560.00
33	592.00	1,776.00
34	80.00	100.00
12 35	160.00	326.50
36	91.50	305.00
37	96.00	320.00
38	48.00	160.00
39	48.00	160.00
41	15.00	32.00
42	5.00	52.00
43	50.00	100.00
48	152.50	265.80
49	19,972.70	30,000.00
50	8,205.12	12,500.00
52	8,407.48	11,000.00
53	2,551.16	2,600.00
54	3,044.06	3,800.00
55	2,671.22	3,250.00
56	2,591.94	3,250.00
57	1,629.60	2,500.00
58	1,178.37	1,200.00
59	2,942.22	3,000.00
60	3,970.00	4,000.00
62	924.08	1,000.00
63	144.98	150.00
64	246.61	375.00
65	150.00	200.00
66	146.31	150.00
67	30.00	25.00
89 (added)		256.30
Total	67,931.97	96,672.60

It is held that decedent's community interest in each and every item of property covered by item numbers as listed had fair market values at date of decedent's death as shown in "determined" column. Item 89 added covers decendent's community interest in a 40% interest in Block 58, Belt Junction City Addition, Harris County, Texas. This item not listed in return but held to be owned by decedent at the date of his death.

EXPLANATION OF ADJUSTMENTS

Schedule B—Stocks and Bonds

	Returned	Determined
Item:		
7	$250.00	$375.00
8	20.00	30.00

Item 7: It is held that the membership in the River Oaks Country Club had a fair market value at date of decedent's death of $750.00, the community interest of decedent a fair market value of $375.00.

Item 8: It is held that the 40% interest in one share of stock of the Houston Country Club had a fair market value at date of the decedent's death of $60.00, the community interest of decedent a fair market value of $30.00.

Schedule F—Other Miscellaneous Property

	Returned	Determined
Item 7—Added		$250.00

This item covers an undivided one-half interest in a judgment against one Nylon obtained in Brazoria County, Texas. It is held that the interest of the decedent in the judgment had a fair market value at date of decedent's death of $250.00.

Schedule G—Transfers

	Returned	Determined
Item 1		$91,593.17

Pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, it is held that the transfers made by the decedent to a trust executed under date of January 20, 1935, for the benefit of his three sons and certain other contingent beneficiaries, are properly includible in the gross estate of the decedent, that is to the extent of the decedent's community property interest herein. The value of the transferred property includible in the gross estate is the value thereof at the date of decedent's death.

14 DEDUCTIONS

Schedule J-1—Funeral Expenses

	Determined	Returned
Item 1	$987.50	$1,975.00

This item covers certain claims of doctors aggregating $1,975.00 which are held to be deductible to the extent of the community half only.

Schedule J-3—Attorney's Fees

	Determined	Returned
Item 1	$500.00	$1,000.00

This item covers fees of attorneys paid in the amount of $1,000.00, but held to be deductible to the extent of the community half only.

Schedule J–4—Miscellaneous Administration Expenses

	Determined	Returned
Item 1	$40.25	$80.51

This item covers miscellaneous administration expenses paid in the sum of $80.51 but held to be deductible to the extent of the community half only.

COMPUTATION OF TAX

	Returned	Determined
Net estate for basic tax	None	$63,749.32
Net estate for additional tax	$1,502.76	123,749.32
1. Gross basic tax	0.00	774.99
2. Credit for gift tax	0.00	0.00
3. Gross basic tax less credit for gift tax	0.00	774.99
4. Credit for estate and inheritance taxes	0.06	0.00
5. Net basic tax	0.00	774.99
6. Total gross taxes (basic and additional)	30.06	13,637.38
7. Gross basic tax	0.00	774.99
8. Gross additional tax	30.06	12,862.39
9. Credit for gift tax	0.00	0.00
10. Net additional tax	30.06	12,862.39
11. Total net basic + add'l. tax	30.06	13,637.38
12. Defense tax	3.01	1,363.74
13. Total tax payable	33.07	15,001.12
Tax assessed on return	$33.07	
Deficiency assessed	1,476.67	
Total tax assessed		1,509.74
Deficiency		13,491.38

Upon receipt of a waiver, or upon the expiration of ninety days from the date of this letter, if a petition is not filed with The Tax Court of the United States, $12,809.39 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by credit for State estate inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by section 81.9 of Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed.

Please advise when the credit evidence may be expected.

16 In the Tax Court of the United States

[Title omitted.]
[File endorsement omitted.]

Answer

Filed Oct. 13, 1943

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in this proceeding admits and denies as follows:

I–II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits that the taxes in controversy are estate taxes on the one-half community interest of the Estate of Harry Holmes in the amount of $13,491.38, but denies the remaining allegations contained in paragraph III of the petition.

IV. (a) (b). Denies that the respondent erred in the manner alleged in subparagraphs (a) and (b) of paragraph IV of the petition.

V. Denies all material allegations contained in paragraph V of the petition.

17 Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. W. Wenchel,
F. B. S.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
James L. Backstrom,
Division Counsel,
Frank B. Schlosser,
Special Attorney,
Bureau of Internal Revenue.

FBS: mjh.

18 IN THE TAX COURT OF THE UNITED STATES

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2943. Promulgated April 5, 1944

Decedent in 1935 executed a trust indenture by which he irrevocably conveyed to himself as trustee certain corporate stocks to be held in trust for his three sons. The period of the trust was to be 15 years and under certain conditions was to continue for a longer term. At the termination of the trust the trust estate then remaining in the hands of the trustee was to be distributed to the respective beneficiaries. The grantor retained for himself while acting as trustee the right to terminate either or all of said trusts and distribute the principal of the trusts to the persons entitled to receive the same under the terms thereof. The decedent retained no power to revest in himself or his estate the trust corpus or to change in any manner the portions of the trust estate which the beneficiaries were to receive. The decedent died in 1940 without having exercised his power to terminate the trusts. *Held*, that the value of the trust's corpus at decedent's death to the extent of the decedent's community property interest therein is not includable in his estate under the provisions of section 811 (d), Internal Revenue Code.

J. E. PRICE, ESQ., for the petitioner.

FRANK B. SCHLOSSER, ESQ., for the respondent.

19 *Opinion*

BLACK, Judge: The Commissioner has determined a deficiency in estate tax against the estate of Harry Holmes, deceased, of $13,491.38. The deficiency is due to six adjustments made by the Commissioner to the estate tax return filed for the estate by the executrix. Only one of these adjustments is contested. It is the one by which the Commissioner added to the value of the property reported by the executrix in the estate tax return an item of $91,593.17 designated as "transfers." This item is explained in the deficiency notice as follows:

"Pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, it is held that the transfers made by the decedent to a trust executed under date of January 20, 1935, for the benefit of his three sons and certain other contingent beneficiaries, are properly includible in the gross estate of the decedent, that is to the extent of the decedent's community property interest therein. * * *"

Petitioner by appropriate assignment of error contests the correctness of the foregoing adjustment made by the Commission.

The facts have been stipulated and they are adopted as our findings of fact. The following summary of these facts will suffice for the purposes of this opinion:

Petitioner is the duly qualified and acting independent executrix of the estate of Harry Holmes, her husband. A timely estate tax return was filed with the Collector of Internal Revenue for the First District of Texas at Austin, Texas.

Harry Holmes of Houston, Texas, on January 20, 1935, executed an instrument which he signed "Harry Holmes, Grantor and Trustee" and which was duly acknowledged by him and recorded in the deed records of Harris County, Texas. In this instrument he created trusts in favor of his three sons, respectively, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, and
20 he conveyed to himself, Harry Holmes, trustee, and successor trustee provided for, for each of the sons, ten shares of stock in the Quintana Petroleum Company, a Texas corporation. This corporation was thereafter liquidated and the pro rata part of the corporation's assets conveyed to Harry Holmes, trustee, under and by virtue of the above-mentioned trusts instrument.

Harry Holmes died on October 5, 1940, five years and eight and one-half months after he had executed this instrument and without terminating the trusts.

The trust indenture contained, among others, the following provisions:

"FIRST

"That I, Harry Holmes, for and in consideration of One ($1.00) Dollar lawful money of the United States of America, and other good, valuable and sufficient consideration to me moving, receipt whereof is hereby acknowledged, do hereby irrevocably give, grant, convey, assign, transfer, set over and deliver said stock unto Harry Holmes, Trustee, during my lifetime—unless sooner terminated as hereinafter provided—and upon my death, unto my sons Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, as Joint-Trustees, or such of them as shall have reached the age of twenty-one (21) years, or shall have had their disabilities of minority removed, or the survivor or survivors of them, or to such other Trustee as may be appointed, as hereinafter provided; * * * for the use and benefit of my sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, in equal shares, and such other beneficiaries and for such purposes as hereinafter provided, * * *

* * * * * *

"The term 'Trustee,' as herein used, shall be construed as
21 referring to myself while I act as Trustee hereunder, and thereafter to each and all of the Joint-Trustees named or provided for, as, if and when they act as such.

* * * * *

"THIRD

"The Trustee shall, upon the execution hereof, divide or allocate the Trust Estate into three equal shares or separate trusts, one share or trust for my son, Harry Holmes, Jr., his surviving issue, if any, and such other beneficiaries and for such other purposes as hereinafter provided; one share or trust for my son, John B. Holmes, his surviving issue, if any, and such other beneficiaries and for such other purposes as hereinafter provided; and one share or trust for my son, Thomas J. Holmes, his surviving issue, if any, and such other beneficiarie. and for such other purposes as hereinafter provided."

In the fourth, fifth, and sixth paragraphs of the trust indenture, each paragraph relating to a separate son, it was provided that during the lifetime of the named son and prior to the termination of the trust, the trustee should distribute the net income from the share or trust so allocated to the respective son in convenient installments, preferably monthly. It was also provided that the trustee might withhold distribution of any portion of said net income should he determine it for the best interest of his son; any portion of this net income so withheld was to be accumulated for the benefit of named son and added to his part of the trust corpus and turned over to him at the termination of the trust.

It was also provided in the fourth, fifth, and sixth paragraphs of the trust that should all of the settlor's sons die without leaving surviving issue prior to receipt and distribution of all of the residue of the trust estate, then such residue should be distributed to the settlor's wife, Lucy B. Holmes, if living, and if she
22 be not living, said residue should be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

The trust instrument further provided:

"SEVENTH

"The Trustee is hereby vested with full and complete legal and equitable title to all of the funds, property and estate embraced within the trusts hereof, both as to principal and income therefrom, subject only to the execution of the respective trusts herein created; and neither principal or the income of the Trust Estate

or of any trust herein created shall be liable for the debts of any beneficiary hereof, nor shall the same be subjected to seizure by any creditor of any beneficiary under any writ or proceeding at law, or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner anticipate or dispose of his or her interest in the Trust Estate, or the income produced thereby, prior to its actual receipt by such beneficiary.

* * * * *

"ELEVENTH

"Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distributed to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests hereunder. And Grantor may, during his lifetime, if deemed advisable by him, and my son of sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and dis-
23 tribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination."

* * * * *

"THIRTEENTH

"The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John B. Holmes, or Thomas J. Holmes, while they are acting as Trustee, as hereinbefore provided) for the period of fifteen (15) years from this date, provided that if, at the expiration of fifteen (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trust shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

"Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed, and

paid over to the persons who are entitled to receive the same in the proportions and according to the provisions of this agreement."

The question which we have to determine in this proceeding is whether the value at date of death of decedent of certain property transferred by him under the terms of a trust indenture executed January 20, 1935, is includible in his gross estate under the provisions of section 811 (d) of the Internal Revenue Code printed in the margin.[1]

The applicable regulations are section 81.20, Treasury Regulations 105, printed in the margin.[2]

Paragraph (d) (1) of section 811, Internal Revenue Code, applies to "transfers after June 22, 1936." Paragraph (d) (2) of said section 811 applies to "transfers on or prior to June 22, 1936" and is the only part of section 811 (d) that applies to the

---

[1] SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest.—To the extent of the interest therein of the decedent at the time of his death;

* * * * * *

(d) Revocable Transfers.—

(1) Transfers After June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(3) Date of Existence of Power.—For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death * * *

[2] SEC. 81.20. Transfers with power to change the enjoyment.—(a) Transfers included.—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

* * * * * *

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

instant case. If the value of the trust corpus here involved is not includable in decedent's estate under the last named provision, then it is not includable at all. We are cited to no other section of the statute under which it would be includable.

In support of his contention that the decedent, grantor of the trusts, retained such powers as to bring them within the provisions of section 811 (d) (2), printed in the margin, the Commissioner relies strongly on Mallon, et al. v. Driscoll, 117 Fed. (2d) 477, cert. denied, 313 U. S. 579, 26 AFTR 436. We do not think this case supports the Commissioner's determination but on the contrary is distinguishable on its facts. In that case in 1917 the settlor executed two deeds of trust for the benefit of his two minor children, a son Thomas and a daughter Lucille. Each of these instruments gave them the income from 150, $1,000 par value of bonds for life with power of appointment by will. After the death of decedent and the Commissioner had included the value of the trust corpus as a part of decedent's taxable estate, the taxpayer estate took the position that in the two trust indentures there involved the decedent had not reserved the power to alter, amend, or revoke the trust but that instead, although using
26 the word "revoke" he had really merely reserved the right to "terminate" the trust and not to "revoke" it and that the word "terminate" was not added to section 302, (d) until the Revenue Act of 1936 and therefore was not applicable to the trust indentures which the taxpayer had executed in 1917 in behalf of his two children, Thomas and Lucille Mellon, the decedent having died in 1934. The pivotal language of the trust indenture involved in Mellon v. Driscoll, supra, was as follows:

"The party of the first part hereby reserves the right after six months written notice of his intention so to do, served on the party of the second part, to revoke this trust, whereupon the principal of the trust fund shall be distributed to Thomas Mellon, S. Lucille Mellon Grange, and the trust shall end."

The Court overruled the contention of the taxpayer and held that the word "revoke" as contained in the statute prior to the 1936 amendment was broad enough to include the right to terminate the trust and that the addition of the word "terminate" to section 302 (d) (1) by the Revenue Act of 1936 did not change existing law but was merely declaratory of what was already the law. If the word "terminate" is understood to have the meaning that the Court gave it in Mellon v. Driscoll, then we agree that it is embraced by the word "revoke" as the statute existed prior to its amendment in the 1936 Act, passed June 22, 1936.

Webster's New International Dictionary, Second Edition, Unabridged, defines the word "revoke," as follows: "To recall, to

annul by recalling or taking back; to repeal, to take back, to reassume, to recover, to draw back, to restore to use or operation." It was evidently in this sense that the Court in Mellon v. Driscoll said that the word "terminate" was embraced within the meaning of the word "revoke." The Treasury in its own regulations recognizes that the word "terminate" in order to be embraced in the word "revoke" prior to the amendment of section 302 (d)
27 by the Revenue Act of 1936 must be interpreted to mean what the Court said it meant in Mellon v. Driscoll for in section 81.20, Regulations 105, printed in the margin, it is said: "* * * A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke,' and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to 'alter'."

The word "terminate" ordinarily does not have as broad and comprehensive a meaning as the word "revoke." The word "terminate" is defined in Webster's New International Dictionary, Second Edition, Unabridged, to mean "To put an end to, to make to cease; to end, to come to a limit in time; to end; close; to have its end; final part, or outcome." Only by giving the word "terminate" the meaning which it is said to have in the Treasury Regulations from which we have quoted above, do we think the Treasury would be justified in saying, as it does, that the word "terminate" was included in the word "revoke" prior to the amendment of June 22, 1936, and that the addition of such word by the amendment was only declaratory of what was already existing law. Therefore, in the light of the above discussion, we think Mellon v. Driscoll, supra, is distinguishable from the instant case because when the settlor, Mellon, created his trust he gave his son and daughter a life estate in the income only from certain property conveyed to the trustee. The two beneficiaries of the trust had no interest whatever in the remainder of the trust except to exercise the power of appointment by will and they could never get any interest therein, unless the grantor exercised the power to revoke or terminate the trust and then conveyed to them the title of the corpus of the trust which would revert to him by revocation or termination. Clearly it seems to us under these circumstances that would have been making another gift of property to
28 these two beneficiaries, the grantor's children. It would have been "a change in the amounts they are to take," because if the settlor did not exercise the power to terminate the trusts his two children would receive only the income of the trust for life but would never receive any of the corpus of the

trust, but would only have the power to appoint the trust estate by will.

Paul in his Federal Estate and Gift Taxation, Volume 1, section 7.09, dealing with "Trusts Subject to the Grantor's Power to Shift the Interests of the Beneficiaries" refers to the case of Mellon v. Driscoll, as follows: "And it has been held that a power to revoke which would change the beneficiaries' interests from life estates to absolute ownership make the grantor's estate taxable."

Thus in Mellon v. Driscoll the exercise of the power of revocation or termination meant a new conveyance of the corpus to the beneficiaries. In the instant case the remainder interest in the trust corpus as well as the right to receive the income during the term of the trust, subject to the right of the trustee to either distribute or accumulate the income for the named beneficiaries, were irrevocably vested in the three beneficiaries by the trust indenture itself and an exercise by the settlor of his power to terminate the trust meant only an acceleration of the time of enjoyment. The settlor reserved no power whatsoever to change the portions of the corpus which each beneficiary was to receive.

It is of course true, as respondent argues, that the mere fact that the settlor could not revest in himself or his estate any of the economic benefits of the property is of no importance. If under the power retained to terminate the trust he had also retained the power to alter or change the portions of the corpus which each beneficiary was to receive, then the value of the trust corpus over which he retained the power of change and alteration would have been includable as a part of his estate. Porter v. Commissioner, 288 U. S. 436, and many other cases which can be cited on that point. And it would have been unimportant whether this power had been retained by Holmes as settlor or only exercisable
29 by him as trustee. Welch v. Terhune, 126 Fed. (2d) 695, cert. denied, 317 U. S. 644.

But in transfers made on or prior to June 22, 1936, where the settlor has retained only a power to terminate the trust and has retained no power to revest in himself or in his estate any part of the trust corpus or to change or alter the disposition of the trust corpus already given to the beneficiaries under the terms of the trust indenture but only to accelerate the time of its enjoyment, we do not think the value of the trust corpus is includable under section 811 (d) (2), Internal Revenue Code, or any other provision of the Internal Revenue Code. As to whether such transfers with such a power to "terminate" as we have here made after June 22, 1936, will be includable in a decedent's estate under section 811 (d) (1), Internal Revenue Code, we express no opinion. We do not have that state of facts before us.

In consideration of the question we have here to decide it is appropriate that we consider that the gift tax and the estate tax are closely related. See Sanford's Estate v. Commissioner, 308 U. S. 39; Higgins v. Commissioner, 129 Fed. (2d) 237, cert. denied, 63 S. Ct. 57.

It seems clear that under Treasury Regulations 108 relating to the gift tax that when decedent executed the trust indenture January 20, 1935, by which he conveyed the shares of stock in trust for the benefit of his three sons, he made a completed gift to each son and that such gifts were taxable in that year to the donor to the extent of their full value. It also seems clear that his reservation of the power to terminate the trusts under paragraph eleven thereof but not to change the beneficiaries or to change the respective interests which they were to receive, did not render the gifts incomplete. The Treasury Regulations so provide. A part of sec. 86.3, Regulations 108 relating to "Cessation of Donor's Dominion and Control" reads:

"A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift."

Suppose that decedent in the year of his death and prior thereto had by a formal instrument in writing relinquished his right to terminate the trusts which had been reserved in paragraph eleven thereof, would such a relinquishment have been the occasion for the imposition of a gift tax? We think not. There would have been by such act no new gift or the completion of a tentative gift already made to justify the imposition of a gift tax on such a relinquishment. If there would have been no imposition of the gift tax on his voluntary surrender of the right to terminate because there would have been no sufficient transfer of property to justify the tax, it is difficult to see how an estate tax would be imposed upon his involuntary cessation of such right by death. For reasons we have already stated we think there was none.

Another case upon which the Commissioner relies is Welch v. Terhune, supra. We think that case is also distinguishable on its facts. The pivotal clause of the trust indenture involved in Welch v. Terhune was as follows:

"This Trust may be terminated or amended at any time, but only with the written consent of the three Trustees herein named,

and of any Trustee appointed by William L. Terhune under clause 14 hereof, or the survivors or survivor of them, and of the then surviving children of the said William L. Terhune."

The decision in the Terhune case turned on the fact that Terhune reserved the right to amend the trust in conjunction
31 with the power to terminate it. This fact, we think, is shown from the following quotation from the court's opinion in the Terhune case:

"In the trust instrument there was also given the power to "amend." The plaintiffs contend that this power must be strictly construed so as to refer only to the minor changes in the mechanics of the operation or management of the trust and not to permit any amendment which would materially vary the respective property interests of the beneficiaries. * * *

"We are sure that these powers to terminate or amend, taken in conjunction, would authorize changes to be made in the enjoyment of the property interests at least as broad as those we held sufficient in Chickering v. Commissioner, 118 F. 2d 254, * * *. And see Commissioner v. Chase National Bank, 82 F. 2d 157, * * *. How much further these granted powers might extend we need not now inquire."

As we have already pointed out, the trust indenture here involved reserves the right to the grantor neither as an individual nor as a trustee to alter or amend the trust. He only had the right to terminate it and thereby accelerate the time that the beneficiaries might enjoy the corpus of the trust which had already been irrevocably given to them in the trust indenture.

For reasons which we have stated above, we hold that the Commissioner erred in adding to the value of decedent's estate the item of $91,593.17 which he designated in his deficiency notice as "transfers."

Reviewed by the Court.

Decision will be entered under Rule 50.

[SEAL]

32 In The Tax Court of the United States, Washington
Docket No. 2943

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the Court's Opinion, promulgated April 5, 1944, the respondent having filed a recomputation of tax on May 1, 1944, and

the petitioner having filed an acquiescence in said recomputation on May 11, 1944, it is

Ordered and decided: That there is no deficiency in estate tax.

Enter:

(Signed) EUGENE BLACK, *Judge.*

Entered May 13, 1944.

33 [File endorsement omitted.]

In the United States Circuit Court of Appeals for the Fifth Circuit

Docket No. 2943

JOSEPH D. NUNAN, JR., COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Aug. 3, 1944

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes Joseph D. Nunan, Jr., Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Lucy B. Holmes, residing at 2315 Dryden Road, Houston, Texas, is the independent executrix of the Estate of Harry Holmes, deceased; that said Harry Holmes died a resident of Houston, Texas, on October 5, 1940;

34 that the estate tax return, Form 706, made for the estate of the decedent, was filed with the Collector of Internal Revenue for the First District of Texas, whose office is located at Austin, Texas, which is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit.

That the Court in which the review in this proceeding is sought is the United States Circuit Court of Appeals for the Fifth Circuit.

II

The nature of the controversy is as follows, to wit:

The estate tax return filed on behalf of the decedent's estate disclosed a tax liability of $33.07. The decedent during his lifetime, on January 20, 1935, made a transfer by trust of certain community property for the benefit of his three sons, under the provisions of which trust the decedent reserved the right to terminate the same within the purview of section 811 (d) of the Internal Revenue Code.

No part of the corpus of the above referred to trust was included in the decedent's gross estate in the estate tax return filed on behalf of his estate. Under date of July 3, 1943, the Commissioner of Internal Revenue mailed a notice to the executrix aforesaid, asserting a deficiency in estate tax in the amount of $13,491.38. In determining the deficiency aforesaid the Commissioner included in the decedent's gross estate the corpus of the aforesaid trust to the extent of the decedent's community interest therein as a transfer intended to take effect at or after the decedent's death, within the purview of section 811 (d) of the Internal Revenue Code.

Under date of September 17, 1943, the executrix aforesaid filed a petition with the Tax Court of the United States for redetermination of the deficiency in the estate tax as determined by the Commissioner. After the answer of the Commissioner was duly filed, the case was submitted to the Tax Court for decision upon the pleadings and a stipulation of facts. The opinion of the Tax Court was promulgated April 5, 1944, and the decision of
35 Tax Court redetermining the deficiency, was entered May 13, 1944, wherein it was ordered and decided that there is no deficiency in estate tax.

In redetermining the deficiency, the Tax Court held that no part of the corpus of the aforesaid trust was subject to be included in the decedent's gross estate for the purpose of the tax.

III

The Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in the opinion of the Tax Court and by its decision, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

The Commissioner's assignments of error are as follows:

1. The Tax Court erred in holding and deciding that the transfer made by the decedent by the trust deed of January 20, 1935, is not subject to be included in the decedent's gross estate for the purpose of the tax.

2. The Tax Court erred in refusing to hold and decide that the transfer made by the decedent by trust deed of January 20, 1935, was subject to be included in the decedent's gross estate under the provisions of section 811 (d) of the Internal Revenue Code.

3. The Tax Court erred in that its opinion and decision are not supported by the evidence, and are contrary to law and regulations.

4. The Tax Court erred in entering its decision that there is no deficiency in estate tax.

Wherefore, the Commissioner petitions that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court
36 for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) Samuel O. Clark, Jr.,
S. L. Y.
SAMUEL O. CLARK,
Assistant Attorney General,

(Signed) J. P. Wenchel,
S. L. Y.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by Ralph F. Staubly; jurat omitted in printing.*]

37 In the United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review.

Filed Aug. 14, 1944

To Mrs. LUCY B. HOLMES,
Independent Executrix, Estate of Harry Holmes, Deceased,
2315 Dryden Road, Houston, Texas.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of August 1944, file with the Clerk of the

Tax Court of the United States, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for
38 review and assignments of error as filed is hereto attached and served upon you.

Dated this 2nd day of August 1944.

(Signed) J. P. Wenchel,
S. L. Y.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 8th day of August 1944.

(Sgd.) ESTATE OF HARRY HOLMES,
DECEASED,
LUCY B. HOLMES,
Independent Executrix,
Respondent on Review.

39 In the United States Circuit Court of Appeals for the Fifth Circuit.

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Aug. 14, 1944

To J. E. PRICE, Esq.,
13th Floor, Sterling Building, Houston, Texas.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of August 1944, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for
40 review and assignments of error as filed is hereto attached and served upon you.

Dated this 2nd day of August 1944.

(Signed) J. P. Wenchel,
S. L. Y.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 5th day of August 1944.

(Sgd.) J. E. PRICE,
Attorney for Respondent on Review.

41 In the Tax Court of the United States

[Title omitted.]

Stipulation of facts

Filed at Hearing Oct. 25, 1943

It is hereby stipulated and agreed that the Court may find the following facts to be true in its determination of the issue involved in this proceeding, subject to the right of either party to offer other evidence not inconsistent with the facts so stipulated.

1. Petitioner is the duly qualified and acting independent executrix of the Estate of Harry Holmes, her husband, who died on October 5, 1940, while a resident of Houston, Texas. A timely estate tax return was filed with the Collector of Internal Revenue for the First District of Texas, at Austin, Texas.

2. By a trust indenture executed under date of January 20, 1935, decedent transferred to himself, as trustee, thirty shares of the capital stock of the Quintana Petroleum Company, to be
42 held in trust for the benefit of his three sons, and certain other contingent beneficiaries, under the terms and conditions set forth in the trust instrument, a true copy of which is attached hereto, marked "Exhibit A," and made a part hereof. Said instrument was filed for registration in the office of the Clerk of the County Court of Harris County, Texas, on November 14, 1938, and duly recorded on November 22, 1938.

3. The said thirty shares of the capital stock of the Quintana Petroleum Company consitituted a part of the community estate of the decedent and his wife, Lucy B. Holmes, the petitioner herein. Quintana Petroleum Company was liquidated on December 31, 1938, and, as the result thereof, a prorata part of the assets of the company were conveyed to decedent as trustee under and by virtue of the trust instrument of January 20, 1935.

4. Decedent did not relinquish his duties as trustee, but continuously acted as such up until the date of his death. It is agreed that the fair market value of a one-half interest in the assets of the trust in the hands of decedent on October 5, 1940, the date of his death, was $91,593.17.

5. In the estate tax return filed by petitioner, the properties in the hands of decedent as trustee under the aforesaid trust indenture of January 20, 1935, were not returned as a part of gross estate. The respondent, in his notice of deficiency, has in-
43 cluded in gross estate decedent's community one-half interest in the said assets at a value of $91,593.17. The correctness of this adjustment is the sole issue for decision by the Court.

J. E. PRICE.
Counsel for Petitioner.
(Sgd.) J. P. Wenchel,
J. L. B.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Exhibit A to stipulation of facts

THE STATE OF TEXAS,
County of Harris.

Whereas, the undersigned, Harry Holmes, desiring to create an irrevocable living trust for my sons, Harry Holmes, Jr., John B. Holmes and Thomas J. Holmes, and for such other beneficiaries and for such other purposes as may be hereinafter designated, have, on this the 20th day of January A. D. 1935, transferred and caused to be issued to me as Trustee, thirty (30) shares of the capital stock of the Quintana Petroleum Company, evidenced by:

Certificate No.	Dated	Shares
19	January 20, 1935	10
20	January 20, 1935	10
21	January 20, 1935	10

Now, therefore, in consideration of the premises, I, Harry Holmes, of the County of Harris and State of Texas, here-
44 inafter called Grantor, do hereby and by these presents, convey, contract, agree, declare, provide, and stipulate as follows, to wit:

FIRST

That I, Harry Holmes, for and in consideration of One ($1.00) Dollar lawful money of the United States of America, and other good, valuable, and sufficient consideration to me moving, receipt whereof is hereby acknowledged, do hereby irrevocably give, grant, convey, assign, transfer, set over, and deliver said stock unto Harry Holmes Trustee, during my lifetime—unless sooner

terminated as hereinafter provided—and upon my death, unto my sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, as Joint-Trustees, or such of them as shall have reached the age of twenty-one (21) years, or shall have had their disabilities of minority removed, or the survivor or survivors of them, or to such other Trustee as may be appointed as hereinafter provided; and I do hereby bind myself and my successor Trustee or Trustees, as hereinafter provided, to hold said stock, together with all and singular all sums of money and other property and effects of every kind and character which may hereafter come into my hands as Trustee, or into the hands of my successor Trustee or Trustees, together with all income, rents, revenues, and profits therefrom, and the increases thereof, and all changes and mutations thereof, in trust, nevertheless, for the use and benefit of ~~my~~ sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, in equal shares; and such other beneficiaries and for such other purposes as hereinafter provided, and I do hereby agree to make and execute whatever assignments, transfers, and conveyances that may be necessary from time to time to carry out the purposes of this trust; provided, however, that I may, during my lifetime, resign or retire as Trustee hereunder, in which event, as to any or either of said trusts that may not have been terminated, my successor Trustee or Trustees, as above named, shall become the active Trustees hereunder and become vested with all the rights herein conferred upon the Trustee named.

Should my sons, Harry Holmes, Jr., John B. Holmes and Thomas J. Holmes, or either of them, fail or refuse or be unable to accept the office of Trustee hereunder, or should either of them die or resign after acceptance, then such of them as do accept the trust, or the survivors or survivor, or remaining Trustees or Trustee, shall become vested with all the rights herein conferred upon the Joint-Trustees. My successor Trustees shall indicate their acceptance of the trust by instrument of writing recorded in the office of the County Clerk of Harris County, Texas, and upon the death or resignation of any Trustee, the remaining or succeeding Trustees or Trustee shall, by instrument in writing, filed in the office of the County Clerk of Harris County, Texas, record such fact, to the end that the proper records may at all times reflect who are the active Trustees hereunder.

If I should die or resign as Trustee hereunder before the termination of this trust, or of either of the trusts herein created, and my sons, John B. Holmes and Thomas J. Holmes, or either of them, not be twenty-one (21) years of age, or shall not have had their disabilities of minority removed, then upon their, or either of them, reaching the age of twenty-one (21) years, or having their

disabilities of minority removed, and the filing and recording in the office of the County Clerk of Harris County, Texas, of an instrument of acceptance, shall become Trustees, or Trustee, hereunder.

Should all of my successor Trustees herein named die or
46 refuse to act as Trustee, then, in that event, the District Court of Harris County, Texas, shall, upon application of any person interested in the trust, name, constitute and appoint a Trustee to carry out the trust.

Should all the Trustees herein named who are twenty-one (21) years of age or who have had their disabilities of minority removed, die or refuse to act as Trustee hereunder, and there should be one or more of such named Trustees who has not had his disabilities of minority removed, then, in such event, the District Court of Harris County, Texas, shall, upon application of any person interested in said trust, name, constitute, and appoint a trustee ad interim to carry out the trust during the minority of such named Trustee or until he shall have his disabilities of minority removed, at which time, or at any time thereafter, upon filing and recording in the office of the County Clerk of Harris County, Texas, of an instrument of acceptance, he shall succeed the person so appointed by the court, and such court appointee shall surrender to such named Trustee possession, control and management of said Trust Estate, and such court appointee's Trusteeship shall be terminated.

In case the court should appoint any Trustee hereunder, such order of appointment shall require such Trustee, within twenty (20) days thereafter, to file a complete inventory of said Trust Estate to be approved by the court, together with bond payable to the beneficiaries of such respective trusts in double the value of such Trust Estates, conditioned for the faithful performance of said trust and the payment to said beneficiaries, in accordance with the terms hereof, said bond to be approved by the court making such appointment (the premium paid for said bond to be deemed and considered a legitimate expense of the Trust), which
order of appointment, inventory and bond and order of
47 approval shall be duly filed and recorded in the office of the County Clerk of Harris County, Texas, and such Trustee shall also be required to file with the Clerk of said court annually, during the month of January, of each year, a complete statement showing all transactions of said trust during the previous calendar year, and all income, expense, and disbursements thereof, and the financial condition thereof, a copy of which statement shall be furnished to each beneficiary thereof, and the failure of such appointed Trustee to prepare and file such statement and furnish copy thereof to each beneficiary, as herein provided, shall be just

cause for removal by the court, upon application of any beneficiary. This shall not be construed as a limitation upon the power of said court to remove said appointed Trustee for any other cause by the court deemed expedient.

The term "Trustee," as herein used, shall be construed as referring to myself while I act as Trustee hereunder, and thereafter to each and all of the Joint-Trustees named or provided for, as, if and when they act as such.

It is expressly provided that any Joint-Trustee herein named may delegate to any Joint-Trustee hereunder any and all powers, discretionary, or otherwise, which are herein delegated to him as such Trustee, and may execute and deliver to either of the other Trustees, a revocable power of attorney, delegating any or all of such powers, but such power of attorney, if executed, shall be filed and recorded in the office of the County Clerk of Harris County, Texas, and shall be revocable at the will of the party making the same, by filing an instrument of revocation in the office of the County Clerk of Harris County, Texas; but such revocation shall not affect or impair the validity or effect of any act performed thereunder prior to the filing of such revocation.

48 SECOND

The Trustee is hereby authorized and empowered to manage and control said trust property, with full power and authority, in the discretion of the Trustee, and in the same manner and to the same extent as the Grantor herein could or would do in the absence of this trust agreement; the Trustee is expressly authorized to invest and re-invest said trust funds, to sue for, collect and receive, all money, property and/or effects due, owing or belonging to said trust, and to issue receipts and acquittances therefor; to contract for the sale of, and or sell at public or private sale, all property, whether real, personal or mixed, of whatsoever kind and wheresoever situated, belonging to said Trust Estate, for such price and upon such terms as to the Trustee may seem most advantageous, to convey with or without covenants of warranty, to execute, acknowledge and deliver to any purchasers thereof, good and sufficient deeds or other instruments of transfer; to lease for any term, even though the term of such lease may extend beyond the term of this trust; to negotiate, execute and deliver oil and mineral leases covering the lands of the Trust Estate upon any terms and conditions the Trustee may deem advisable; exchange all or any of said property, mortgage, pledge, hypothecate or otherwise deal with any property or assets that may from time to time comprise this Trust Estate; to renew, extend, and/or rearrange any or all indebtedness, and/or liens owing by, or existing against, the Trust Estate; to compromise, settle, abandon, and/or relinquish

any or all claims due or owing to the Trust Estate, or in which it may be interested, to operate any business or interest in business comprised in this Trust Estate, or in which it is in any manner interested, or which might in the discretion of the Trustee be advantageously operated in connection with this Trust Estate;

49 to invest and reinvest the property and funds of this Trust Estate in such securities or other property, real, or personal, as in the discretion of the Trustee may be deemed most advisable for the benefit of the trust herein created; to incur and pay out of said trust funds such expenses or other charges as the Trustee may deem necessary or advisable for the benefit of the Trust Estate, and the right and power to apportion as between income and capital, any expenditure, which, in his opinion, should be so apportioned, notwithstanding any legal rule to the contrary, and the Trustee, in his discretion, may retain investments in the form received, and shall not be limited in his powers to make investments to the class of securities regarded as legal investments for trust funds. The Trustee herein named or provided for is expressly authorized and empowered to employ for a limited or unlimited time, a manager or one or more managers for any or all of the property comprising this Trust Estate, and the Trustee is authorized to delegate to such manager or managers such power and authority as may be deemed advisable and which are herein vested in the Trustee.

The Trustee hereof is also expressly authorized to purchase from the executor or administrator of Grantor's estate any property, real or personal, contained in said estate, and is also expressly authorized to make loans to such executor or administrator of Grantor's Estate, either secured or unsecured, and at such rate of interest as the Trustee shall deem advisable, provided, however, the Trustee hereof shall not be responsible for any loss resulting to this Trust Estate by reason of retaining as a part of this Trust Estate any property purchased from Grantor's general estate.

The above enumeration of powers of the Trustee herein

50 shall never be construed as a limitation upon the right and power of the Trustee to do any and all things whatsoever by the Trustee deemed necessary or requisite in the administration of this Trust Estate.

THIRD

The Trustee shall, upon the execution hereof, divide or allocate the Trust Estate into three equal shares or separate trusts, one share or trust for my son, Harry Holmes, Jr., his surviving issue, if any, and such other beneficiaries and for such other purposes, as hereinafter provided; one share or trust for my son, John B. Holmes, his surviving issue, if any, and such other beneficiaries

and for such other purposes, as hereinafter provided; and one share or trust for my son, Thomas J. Holmes, his surviving issue, if any, and such other beneficiaries and for such other purposes as hereinafter provided.

FOURTH

During the lifetime of my son, Harry Holmes, Jr., and prior to the termination of the trust herein created for his benefit, the Trustee shall distribute the net income from the share or trust so allocated to my son, Harry Holmes, Jr., to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Harry Holmes, Jr., die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such
51 portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance, and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or shee shall have theretofore received the income.

If my son, Harry Holmes, Jr., shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, Harry Holmes, Jr., or his said issue, shall enure pro rata to my sons, John B. Holmes and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons John B. Holmes or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor, or to the issue of the other, to be administered and distributed in the same manner as hereinafter provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not
52 then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Harry Holmes, Jr., or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution or said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

FIFTH

During the lifetime of my son, John B. Holmes, and prior to the termination of the trust herein created for his benefit the Trustee shall distribute the net income from the share or trust so allocated to my son, John B. Holmes, to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest of my said son, any portion of said net income witheld to be accumulated for his benefit; provided, should my said son, John B. Holmes, die during
53 the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance and education, until such

beneficiary arrives at twenty-one (21) years, any unusued portion or said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, John B. Holmes, shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, John B. Holmes, or his said issue, shall enure pro-rata to my sons, Harry Holmes, Jr., and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons, Harry Holmes, Jr., or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor or to the issue of the other, to be administered and distributed in the same manner as in this instrument provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

54 Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, John B. Holmes, or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

SIXTH

During the lifetime of my son, Thomas J. Holmes, and prior to the termination of the trust herein created for his benefit, the

Trustee shall distribute the net income from the share or trust so allocated to my son, Thomas J. Holmes, to him in convenient installments, preferably monthly, provided the Trustee may
55 withhold distribution of any portion of said income, should he determine it for the best interest of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Thomas J. Holmes, die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, Thomas J. Holmes, shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, Thomas J. Holmes, or his said issue, shall enure pro rata to my sons, Harry Holmes, Jr., and John B. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons, Harry Holmes, Jr., or John B. Holmes, should
56 then be dead without issue, the whole of such share or trust shall enure to the survivor or to the issue of the other, to be administered and distributed in the same manner as in this instrument provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Thomas J. Holmes, or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

57 SEVENTH

The Trustee is hereby vested with full and complete legal and equitable title to all of the funds, property and estate embraced within the trusts hereof, both as to principal and income therefrom, subject only to the execution of the respective trusts herein created; and neither principal or the income of the Trust Estate or of any trust herein created shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law, or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner anticipate or dispose of his or her interest in the Trust Estate, or the income produced thereby, prior to its actual receipt by such beneficiary.

EIGHTH

In any case in which the Trustee is required, pursuant to the provisions of this trust agreement, to allocate or divide the property into separate trusts, or to divide the principal of either or any trust so allocated, and distribute the same, said Trustee is authorized and empowered to make such allocation, division or distribution in kind, or partly in kind and partly in money, as in the discretion of the Trustee may be deemed advisable, and for the purpose of such allottments, division or distribution, the judgement of the Trustee concerning the propriety thereof, and the relative value thereof, for the purpose of allocation or for division and distribution, shall be binding and conclusive on all parties interested therein.

NINTH

58 The Trustee shall keep books of account showing all transactions relating to the Trust Funds held by the Trustee under this trust agreement, and shall also, in each year, furnish to each adult beneficiary interested in the trust or trusts, a statement showing how such trust funds are invested and all transactions relating thereto, subsequent to the last preceding annual account.

TENTH

The Trustee shall never be liable to any beneficiary hereunder for any error of judgment or for any loss arising out of any act or omission in the execution of this trust, except for fraud, misapplication or wilfull neglect.

No person dealing with the Trustee hereof shall ever be required to look to the application of any of the trust funds by such Trustee.

The Trustee shall have, and is hereby given, the express right to apportion any and all stock dividends or benefits from the sale of securities or other property, or any part thereof, either to income or as additions to principal.

ELEVENTH

Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his lifetime, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination.

59 TWELFTH

Neither Grantor or either of the Trustees herein named shall receive any compensation for their services as such Trustee. Any Trustee appointed by the court shall receive for his services, or for the joint services, if more than one be so appointed, an annual fee of not to exceed three percent (3%) of the net income of the trust for which he acts.

THIRTEENTH

The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John B. Holmes or Thomas J. Holmes, while they are acting as Trustees, as hereinbefore provided), for the period of fifteen (15) years from this date, provided that if, at the expiration of (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trustee shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events, the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust, that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed and paid over to the persons who are entitled to receive the same in the proportions and according to the provisions of this agreement.

60 In testimony whereof, said Harry Holmes, as Grantor and as Trustee, has executed these presents, this the 20th day of January, A. D., 1935.

HARRY HOLMES,
Grantor and Trustee.

THE STATE OF TEXAS,
County of Harris.

Before me, the undersigned authority, on this day personally appeared Harry Holmes, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office, this the 20th day of January A. D. 1935.

[SEAL] NEDRA M. PATTISON,
Notary Public in and for Harris County, Texas.

61 THE STATE OF TEXAS,
County of Harris.

I, Henry M. Dudley, Clerk of the County Court of Harris County, Texas, do hereby certify that the within instrument with its certificate of authentication was filed for registration in my office on Nov. 14, 1938, at 4:10 o'clock P. M., and duly recorded

on Nov. 22, 1938, at 11:35 o'clock A. M., in Vol. 1103, Page 411 of record of Deeds for said County.

Witness my hand and seal of office at Houston, the day and date last above written.

HENRY M. DUDLEY,
Clerk County Court, Harris County, Texas.
By BETTY HOCHULI,
Deputy.

62 In the United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]
[File endorsement omitted.]

Praecipe for record on review

Filed Nov. 13, 1944

To the Clerk of the Tax Court of the United States

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Tax Court of the United States.
2. Pleadings before the Tax Court:
(a) Petition, including annexed copy of the deficiency notice.
(b) Answer.
63 3. Opinion and Decision of the Tax Court.
4. Petition for Review, together with proof of service of Notice of Filing Petition for Review and of service of a copy of Petition for Review.
5. Stipulation of Facts and Exhibit attached.
6. This Praecipe for record.

(Sgd.) SAMUEL O. CLARK, JR.,
Assistant Attorney General.
(Sgd.) J. P. Wenchel,
C. A. R.
J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

Service of a copy of the within Praecipe is admitted this 7th day of November 1944.

J. E. PRICE,
Attorney for Respondent on Review.

64 [Clerk's certificate to foregoing transcript omitted in printing.]

65 In United States Circuit Court of Appeals, Fifth Circuit

No. 11206.

COMMISSIONER OF INTERNAL REVENUE

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

Minute entry of argument and submission

March 6, 1945

On this day this cause was called, and, after argument by Hilbert P. Zarky, Esq., Special Assistant to the Attorney General, for petitioner, and J. E. Price, Esq., for respondent, was submitted to the Court.

66 In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11206

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, RESPONDENT

Petition for Review of Decision of the Tax Court of the United States (District of Texas)

(April 14, 1945)

Before HUTCHESON, HOLMES, and MCCORD, Circuit Judges

Opinion

Filed April 14, 1945

HOLMES, Circuit Judge: This is an estate tax case involving the question whether the settlor of an irrevocable trust reserved

powers enabling him to change in enjoyment the interests created thereby, so that, upon his death without having exercised such powers, a taxable interest passed from him.

67 On January 20, 1935, Harry Holmes transferred 30 shares of stock to himself, as trustee, for the benefit of his three sons. The instrument set up three trusts, which were identical in terms. They were for a period of 15 years, unless terminated earlier by the trustee or trustees. The settlor was the trustee of each trust, with provision that, upon his death or resignation prior to the termination of the trusts, such of his sons as had then attained their majority or had their disabilities of minority removed should become joint trustees.

Each trust named as beneficiary one son, who was to receive the income therefrom during the life of the trust and the corpus upon termination thereof. If any son should die during the continuance of the trust, the beneficial interests would pass to his surviving issue, share and share alike, subject to distribution when such beneficiary or beneficiaries became 21 years of age. If any son died leaving no issue, or if his surviving issue died before becoming 21 years of age, his interest passed to his surviving brother or brothers or, if they were both dead, to their surviving issue per stirpes. If all three sons died without issue prior to termination, the whole of the trust properties then remaining passed to the settlor's wife, if living, or to her heirs at law.

The trusts provided that the trustee should distribute the net income from each trust to the beneficiary in convenient monthly installments, but that the trustee, if he deemed it to the best interest of the beneficiary, could withhold distribution of any portion of the net income, accumulate it, and turn it over to the beneficiary with the corpus upon termination of the trust. The trustee was empowered to use trust corpus when necessary or advisable for the maintenance, welfare, or happiness of the beneficiary; he could distribute said principal in whole or in

68 part whenever he deemed it advisable, or could terminate the trusts, in which event the corpus would be distributed to the persons entitled thereto on the date of termination.

Harry Holmes acted as trustee of the trusts, and did not terminate them prior to his death on October 5, 1940. His executrix did not include in the estate tax return any of the property that had been transferred to the trusts. The Commissioner, claiming that the trust property should have been included in the trust estate, assessed a deficiency. The Tax Court held that the property was not includible in the gross estate of the decedent, and the Commissioner appealed. His contention is that the reservation by the decedent of the power to terminate the trusts at will enabled him to give to the then existing beneficiaries complete

ownership of the trust corpus, and thereby to extinguish all contingent interests; and that the relinquishment of this power by the decedent at death was the first complete transfer of the grantor's control over the enjoyment of the trust benefits.

The applicable statute is Section 811 (d) of the Internal Revenue Code, which relates to revocable transfers. Subsection (1) thereof provides that the value of the gross estate of a decedent for estate tax purposes shall include the value of all property to the extent of any interest therein of which the decedent has made a transfer in trust after June 22, 1936 (except bona fide sales for an adequate consideration), where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate. Subsection (2) thereof provides that with respect to transfers on or prior to June 22, 1936, any interest so transferred is includible where the enjoyment thereof was subject, at the date of decedent's death, to any change through the exercise of a power by the decedent to alter, amend, or revoke. As the
69 present trusts were created prior to June 22, 1936, Subsection (2) of the statute, which does not expressly mention a power to terminate, is controlling in this case.

This portion of the statute was included in the Revenue Act of 1924 and each succeeding act as Section 302 (d) thereof, and has been frequently before the courts. Fifteen years after its first enactment, Mr. Justice Stone, in the case of Estate of Sanford v. Commissioner, 308 U. S. 39, reviewed the decisions of the court involving the statute, and summarized as follows: "The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death." Since the reservation in the present case did not empower the donor either to revoke the trust instrument and recapture the trust property, or to modify the terms of that instrument so as to designate new beneficiaries or in any other manner change the fixed provisions thereof, it is patent that the Commissioner is now seeking to extend the rule beyond the bounds long established.

The Commissioner argues that the words "alter, amend, or revoke" should always have been construed to include the power to terminate, and that the addition of the word "terminate" in the 1936 act added nothing of substance to the statute, but was only declaratory of the existing law. This view is based upon the report issued by the Ways and Means Committee in connec-

tion with the enactment of the 1936 law, which report read in part as follows: "In the case of White v. Poor, 296 U. S. 98, the Supreme Court did not pass on the question whether the
70 power to terminate was included in the language relating to a power 'to alter, amend, or revoke.' Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed to be declaratory of existing law."

We do not consider this report helpful to the Commissioner here. It is at once apparent that the word "terminate," if used to mean the same thing as "revoke," adds nothing of substance to the statute. In any case where the grantor retains a power called a power to terminate, but where the power when exercised is the equivalent of a revocation, the trust res should be included in the estate of the grantor under either provision of the statute. It may also be true that the power to terminate a trust is ordinarily the equivalent of a power to revoke, for in many instances the trust instrument conveys property for the life of the trust only, without any conveyance over of the res upon termination, and the effect of the termination is to nullify the grant and return the trust property to the grantor.

That the word was used in this restricted sense only is the interpretation given the statute by the Treasury. Section 81.20 of Treasury Regulations 105 provides: "Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke.'"

Of critical importance in the case at bar is the fact that the trust instrument not only operated to convey the trust es-
71 tate, but the instrument also provided that, if the decedent exercised his power as trustee to terminate the instrument, the ownership of the properties should vest in named beneficiaries other than the grantor. The power to terminate was not capable of being so exercised as to revest in the decedent any legal or beneficial title to any interest in the trust property, nor could it operate to empower the decedent to choose different beneficiaries from those named, or to alter the benefits received by them.

The Commissioner also relies upon the case of Mellon v. Driscoll, 117 F. (2d) 477. The Tax Court thought that the *Mellon* case was distinguishable from this one on the facts. If it is not so distinguishable, then we decline to follow it. In that case the court reached its conclusion by holding, without citation of authority, that "revocation is but a method of bringing a trust to an untimely

end and has no relation to the consequent and subsequent fate of the corpus." We prefer to ascribe to the word "revoke" the meaning attributed to it by dictionaries,[1] by the Regulations,[2] and by the courts generally;[3] namely, to annul or make void by recalling or taking back; to recall a grant. Indeed, in Porter v. Commissioner, 288 U. S. 436, the contention was made that the phrase "alter, amend, or revoke" related only to such powers as were exercisable to revest the property conveyed in the grantor. The court disposed of this by saying that the words were used disjunctively, and that "alter" and "modify" were not used as equivalents of revoke, thus recognizing that a revocable transfer is one subject to being recalled by the transferor.

72 We agree with the Tax Court that the grantor did not have any power to alter, amend, or revoke, and that the trust properties were not includible in the gross estate. The decision appealed from is affirmed.

Dissenting opinion.

McCORD, Circuit Judge, dissenting:

This is an estate tax case which involves the question whether the trust from which it stems was irrevocable, or whether it falls within the inhibition of Section 811 (d) (2) of the Internal Revenue Code, 26 U. S. C. 1940 ed., Sec. 811.

Where a grantor has attempted to dispose of his property by trust, such instrument must show clearly that it is irrevocable and that grantor retains no interest in or control over such property as owned. It has been repeatedly held that if the reserve power of a grantor permits him, in any manner, to alter, amend, revoke or designate the interest of the beneficiaries named in the trust, it will be sufficient to cause the property to be included in the gross estate of such grantor. Union Trust Co. v. Driscoll, 138 F. (2) 152, cert. denied; Welch v. Terhune, 126 F. (2) 695, cert. denied; Mellon v. Driscoll, 117 F. (2) 477, cert. denied; Millard v. Maloney, 121 F. (2) 257, cert. denied.

Paragraphs four, eleven and thirteen of the trust instrument here under consideration makes it plain that the termination of the trust would accomplish much more than "to accelerate the time of its enjoyment"; that the corpus was not by the instrument "already given to the beneficiaries," but on the contrary, the grantor could "change or alter the disposition of the trust corpus"

[1] Webster's New International Dictionary; Funk & Wagnall's New Standard Dictionary.
[2] Section 81.20 of Treasury Regulations 105, supra.
[3] Reinecke v. Northern Trust Company, 278 U. S. 339; Burnet v. Guggenheim, 288 U. S. 280; Porter v. Commissioner, 288 U. S. 436; Helvering v. Helmholz, 296 U. S. 93; Estate of Sanford v. Commissioner, 308 U. S. 39; Morton v. Commissioner, 109 F. (2) 47; Commissioner v. Branch, 144 F. (2d) 985.

by transforming some contingent interests into absolute
73 ownership and thereby destroy other contingent interests altogether.

While each of the three sons named as beneficiaries was given a present interest in the income from the trust even that interest was not absolute. The grantor had the right as trustee to withhold income payments "should he determine it for the best interest of" the named beneficiaries. This, together with the spendthrift provisions, insured continuing control over the income by the grantor. Moreover, he reserved the right to terminate the trust at any time in his lifetime. If the trust were terminated in this manner, the corpus would be paid to the beneficiaries then entitled to it. Thus, by exercising his retained authority, the grantor could have changed the contingent interests of his three sons with respect to the corpus into rights of absolute ownership. By the same token, had he terminated the trust, he could have extinguished the contingent interests which each son had in his brothers' putative shares, the contingent interests which the issue, or potential issue, of each son would have, and also the contingent interest of the grantor's wife.

The grantor named himself trustee of the trust and administered the same until he died; and the instrument forbade the beneficiaries from pledging or alienating their interests until it came into their possession.

It becomes patent, I think, that this instrument does not measure to an irrevocable trust, but is a substitute for testamentary disposition, and opens the door to the makers of trust instruments through which they may escape gift, inheritance or estate taxes. Welch v. Terhune, 126 F. (2) 695.

The Tax Court has given to this instrument a crutch with
74 which it is enabled to stand upright, whereas it should have been permitted to fall because of its weaknesses and defects.

I cannot bring myself to agree with my colleagues.

75 In United States Circuit Court of Appeals,
Fifth Circuit

No. 11206

COMMISSIONER OF INTERNAL REVENUE

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

Judgment

This cause came on to be heard on the petition of Commissioner of Internal Revenue for a review of a decision of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decision of the said Tax Court of the United States appealed from in this cause be, and the same is hereby, affirmed.

McCORD, Circuit Judge, dissents.

76 [Clerks certificate to foregoing transcript omitted in printing.]

77 Supreme Court of the United States

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

[Endorsement on cover:] File No. 49,906. U. S Circuit Court of Appeals, Fifth Circuit. Term No. 203. Commissioner of Internal Revenue, Petitioner vs. Estate of Harry Holmes, Deceased, Lucy B. Holmes, Independent Executrix. Petition for a writ of certiorari and exhibit thereto. Filed July 6, 1945. Term No. 203 O. T. 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945